Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH J. CLARK, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

MULHOLLAND & HICKEY
EDWARD J. HICKEY, JR.
General Counsel, Public Employee Department, AFL-CIO,
Counsel of Record

THOMAS A. WOODLEY
RICHARD J. HIRN
1125 - 15th Street, N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 833-8855

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Applies To Promotions Or Transfers From WS Positions As Well As From GS Positions	3
B. The Legislative History And Purposes Of Section 5334(b) Confirm That It Was Meant To Include Promotions And Transfers From Wage System Positions	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102 (1980)	4
Diamond v. Chakrabarty, 447 U.S. 303 (1980)	13
Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129 (1936)	8
March v. United States, 506 F.2d 1306 (D.C. Cir. 1974)	12
United States v. Larionoff, 431 U.S. 864 (1977)	8
T.V.A. v. Hill, 437 U.S. 153 (1978)	9
Yates v. United States, 354 U.S. 298 (1957)	9

Statutes and Regulations:

5 U.S.C.	§ 5102	4
	§ 5102(a)(5)	5
	§ 5301-5385	4
	§ 5334(a)	8
	§ 5334(b)	2, 3, 4, 8
	§ 5343(e)(1)	6
	§ 5343(e)(2)	6
	§ 5346	6
	§ 5361	4, 5
	§ 5361(4)	5
	§ 5361-5366	4
5 C.F.R.	§ 531.202(h)	7
	§ 531.203(c)	8
	§ 532.506(d)(1)(2)	6
	§ 532.702(b)	6
	§ 536.201	6

IN THE

Supreme Court of the United States

No. 80-1121

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH J. CLARK, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

INTEREST OF THE AMICUS

The Public Employee Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) files this brief, *amicus curiae*, in support of the position of Respondents, Joseph J. Clark, *et al.*, pursuant to Rule 36 of the Rules of the Supreme Court.* The Public Employee Department is an association of national and international labor unions which are affiliated with the AFL-CIO and have members employed in the public sector. Its objectives include promoting and securing improved wages, hours and working conditions

* All parties consented to the filing of this *amicus curiae* brief.

of government workers through collective bargaining, legislation, and other appropriate means.

The Public Employee Department offers its *amicus curiae* brief in this case on behalf of the interests of the federal employees who are represented in a collective bargaining capacity by its constituent labor organizations and who may be affected by the decision of this Court.

SUMMARY OF ARGUMENT

This case presents a question of statutory interpretation, i.e., whether a federal employee who is promoted or transferred from a Wage System (WS) position to a General Schedule (GS) position in a higher grade of pay is entitled to the minimum two step pay increase required under 5 U.S.C. Section 5334(b). In the Court of Claims, the Respondents claimed that they were entitled to the two step increase under this statutory provision when they were promoted from their WS jobs to certain GS positions. The Petitioner United States, as the employer of the Respondents, contended that this two step increase only applies when the promotion or transfer takes place from a GS position to a higher GS position. In rejecting Petitioner's arguments, the Court of Claims held that the language and intent of the statutory provision applied equally to those federal employees who are promoted from a prevailing rate WS position to a GS position. (Pet. App. 1a-8a).

The decision of the Court of Claims was correct. The plain language of 5 U.S.C. § 5334(b) does not contain the limitation which the Petitioner seeks to read into it. The Petitioner mistakenly relies on the language of the statute which refers to "the *grade from* which he is promoted or transferred" (emphasis supplied) as proof that the promotion or transfer must be from a GS position. That clause was included in the statute to set a standard for mechanically fixing the actual pay increase

rather than to carve out a group of employees who were equally deserving of its beneficial treatment. In any event, contrary to Petitioner's suggestion, the Wage System also contains "grades" from which an employee could be promoted or transfered into the GS System.

In addition to the language of the law, the legislative history and purpose also support the statutory construction of the Court of Claims. Congress enacted 5 U.S.C. § 5334(b) and its predecessor provision in order to guarantee that federal employees who receive a promotion or transfer into a higher grade would be assured a specified minimum increase in pay to match the increase in duties and responsibilities that the Government assigned to them. This policy has equal force and application whether the employee was promoted or transferred from a WS position or from a GS position. No legislative history has been cited by Petitioner which would sustain its inequitable argument that Congress intended to bar WS employees from the protective benefits of the statute.

ARGUMENT

TITLE 5 U.S.C. § 5334(b), WHICH REQUIRES AT LEAST A TWO STEP PAY INCREASE FOR EMPLOYEES PROMOTED OR TRANFERRED TO A POSITION IN A HIGHER GRADE, APPLIES TO CHANGES OF POSITION FROM THE WAGE SYSTEM TO THE GENERAL SCHEDULE AS WELL AS WITHIN THE GENERAL SCHEDULE.

A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Applies To Promotions Or Transfers From WS Positions As Well As From GS Positions.

The starting point in every case which involves the interpretation of a statute is the language of the statute itself. Unless there is a clearly expressed legislative intent to the contrary, the language of the statute must be

regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). Section 5334(b) states in pertinent part:

> (b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred . . .[1]

The term "employee", as used in this section, is defined as "an individual employed in or under an agency." 5 U.S.C. §§ 5102, 5331. Simply stated, the reference to "employee" in Section 5334(b) encompasses all employees working for a federal agency and no distinction is drawn between WS or GS workers. Thus, the Respondents who were WS employees are covered under this provision.

Indeed, Section 5334(b) further states that "[i]f an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter . . ." he is entitled to specified pay benefits upon a reduction in force.[2] Subchapter VI, in turn, defines "employee" to include ". . . a prevailing rate employee, as defined by Section 5342(a)(2). . . ." 5 U.S.C. § 5361. These are precisely the WS employees at issue here. Moreover, the reference in Section 5334(b) to a promoted employee's "basic pay at a rate saved to him under subchapter VI" is defined in subchapter VI ". . . in the case of a prevailing rate [WS] employee, [as] the scheduled rate of pay determined under section 5343 of this Title."

---

[1] This statutory provision falls within Chapter 53 (Pay Rates and Systems) of Title 5 which governs employees in both the WS and GS systems. 5 U.S.C. §§ 5301-5385.

[2] Subchapter VI (5 U.S.C. §§ 5361-5366) applies to grade retention for WS and GS employees following a change of positions or a reclassification.

5 U.S.C. § 5361(4). In short, rather than excluding WS employees, Section 5334(b) expressly provides for their protection when they are promoted or transferred into the GS system.

Furthermore, as the Court of Claims noted below, it is undisputed that the Respondents were "promoted" to a higher grade and level of pay. (Pet. App. 2a, 4a; J.A. 15-37). Accordingly, each Respondent was "[a]n employee who is promoted or transferred to a position in a higher grade." Section 5334(b). In this context, the lower court properly determined that the Respondents were "entitled" to at least a two step increase guaranteed by Section 5334(b).

The Petitioner concedes that Section 5334(b) contains no express limitation on where the employees must be promoted or transferred from in order to be entitled to the two step increase. Nevertheless, in a strained analysis, the Petitioner contends in its brief (p. 12) that because the section guarantees that a promoted employee is to be paid "not less than two step increases of *the grade from which he is promoted or transferred*" (emphasis supplied), and the term "grade" is defined by 5 U.S.C. § 5102(a)(5) as rates of pay in the General Schedule, the promoted or transferred employee must come from a GS position to qualify for this entitlement. This contention misses the mark.

The phrase "the grade from which he is promoted or transferred" was aimed merely at providing the standard or method for actually computing the pay increase. In other words, the reference point for calculating the two step increase was the grade *from* which the employee came and not the grade *to* which he was assigned. Contrary to Petitioner's theory, the phrase was not designed to narrow the scope of Section 5334(b) to GS employees. If this was Congress' objective it surely would have chosen more direct and understandable language to establish such a limitation.

In any event, while Petitioner has tried to bolster its position by stressing the use of the term "grade" in the GS System, it has conveniently failed to mention that the terms "grade" and "steps" are also prevalent in setting pay rates in the Wage System.[3] In fact, the Civil Service Regulations of the Office of Personnel Management (OPM) refer to "grades" for employees under the prevailing rate or Wage System. 5 C.F.R. § 532.506(d)(1)(2), § 532.702(b). See also, FPM Chapter 532, Subchapter 6.[4]

Clearly, the term "grade" is not unique to the GS system. Here, it is uncontested that each of the Respondents was promoted from the position of Ship Surveyor, a "Grade 8" within the Wage System. (Pet. App. 2a; Form 50 "Notification of Personnel Action", J.A. 15-37).[5] In these circumstances, it is beyond question that the Respondents were promoted or transferred from a lower "grade" and are thus not excluded from the literal overage of Section 5334(b).

Without reference to any language in the statute, the Petitioner belatedly argues that the promotions which the Respondents received were not the type of promotions contemplated in Section 5334(b).[6] The Petitioner claims

---

[3] *See, e.g.*, 5 U.S.C. § 5343(e)(1) ("Each grade of a regular wage schedule for nonsupervisory prevailing rate employees shall have 5 steps . . ."); 5 U.S.C. § 5343(e)(2) (a prevailing rate employee advancing "to the next higher step within the grade"); 5 U.S.C. § 5346 (establishing a "Job grading system" for WS employees); 5 U.S.C. §§ 5361-5366 (grade retention for prevailing rate employees).

[4] OPM even has a regulation for the comparison of grades in different pay systems. 5 C.F.R. § 536.201.

[5] Five of the Respondents were at the step 5 level of grade 8, and one Respondent, Nicholas J. Libbretto, was at the step 4 level. (J.A. 15, 19, 23, 35, 37).

[6] Before the Court of Claims, the Petitioner did not contest the fact that the Respondents were "promoted" employees, as that

that the Respondents were "nominally" promoted only because their employing agency, the Navy Department, gave the Respondents an increase in salarly upon assignment to their new positions (Brief, pp. 13-14). The Petitioner would thus have this Court believe that the Respondents were "promoted" only in a technical sense pursuant to 5 C.F.R. § 531.202(h) which states "Promotion means a change of an employee, while continuously employed, from . . . [a] lower rate paid under authority other than subchapter 14 of Chapter 53 of Title 5, United States Code, to a higher rate within a General Schedule grade."

As the Court of Claims found, however, each of the six Respondents received not just a promotion in the limited technical sense of 5 C.F.R. § 531.202(h), but applied for and was appointed to his new position pursuant to the Department of the Navy Merit Promotion Program. (Pet. App. 2a; Form 50, "Notification of Personnel Action", J.A. 15-37). Regardless of whether the Respondents received a merit promotion, a "nominal" promotion as the Petitioner puts it, or were merely "transferred to a position in a higher grade", Section 5334(b) applies to them and all such employees. The statute contains no limitation on the *type* of promotion which is necessary to qualify for the entitlement, and the Petitioner has offered no reading of the statute which would discriminate among promotions. On the contrary, Congress' use of the broad, catchall word "transferred" reflects an intention to bring within the beneficial coverage of Section 5334(b) all those employees who are moved to a higher grade by their agency-employer.

The Petitioner also implies (Brief, pp. 14-15) that since the promotions were a result of its purely discretionary act of giving the Respondents an initial salary

---

term is commonly understood in an employment context. (Pet. App. 2a, 4a).

increase in their new positions, it should not be obligated to pay them the entire two step increase. Of course, any time the Government promotes one of its employees (whether on merit or not) or transfers an employee to a higher grade, it is a discretionary act. To make an exception for promotions that were made at the Petitioner's discretion would render Section 5334(b) a nullity.

The Petitioner advances the additional argument that 5 U.S.C. § 5334(a) grants OPM carte blanche to prescribe regulations establishing the basic rate of pay for employees (such as the Respondents,) whose appointments or positions have been changed, and therefore it had the authority to deny the Respondents a two step increase. The regulation which OPM has promulgated pursuant to this subsection, known as the "highest previous rate" rule (5 C.F.R. § 531.203(c)), was invoked to deny the Respondents a two step increase. The Petitioner claims that its "express authority under Section 5334(a) to set standards governing GS rates of pay is not superseded here by the limited exception contained in 5 U.S.C. § 5334(b)." (Brief, p. 12). Section 5334(a) mandates, however, that the regulation issued by OPM with regard to the rates of pay must be ". . . in conformity with this subchapter . . ." As the Court of Claims correctly decided, the "highest previous rate" rule is *not* in conformity or consistent with Section 5334(b). (Pet. App. 8a). Accordingly, such regulation is invalid. *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

It is clear that Section 5334(b) applies on its face to all employees who are promoted or transferred to a position in a higher grade from a position in either the General Schedule or Wage System. The statute contains no language which limits its applicability to promotions or transfers solely within the General Schedule. Section 5334(b)—like all statutory provisions—should be read

according to the normal and obvious import of its wording "without resorting to subtle and forced construction for the purpose of . . . limiting . . . its operation." *Yates v. United States*, 354 U.S. 298, 311 (1957).

B. The Legislative History and Purposes of Section 5334(b) Confirm That It Was Meant To Include Promotions And Transfers From Wage System Positions.

When the language of a statute is clear and unambiguous, as the language of Section 5334(b) is, the courts will ordinarily not need to look at its legislative history as a guide to its meaning. *T.V.A. v. Hill*, 437 U.S. 153, 184 n. 29 (1978). Nevertheless, the relevant legislative history of Section 5334(b) reinforces the Court of Claims' conclusions below.

The Court of Claims held, and the Petitioner admits, that Section 5334(b) was intended to insure that a promotion in duties and responsibilities would carry with it an increase in pay. As the lower court noted, the House Report on Section 802 of the Classification Act of 1949 (63 Stat. 954, 969),[7] which was the predecessor to the current Section 5334(b), leaves little doubt as to what Congress intended:

> Subsection (b) of section 802 provides that *any officer or employee* who is promoted or transferred to a position in a higher class or grade shall receive basic compensation at the lowest rate of the higher class or grade which is at least one step increase above his existing rate of basic compensation.
>
> • • • •
>
> At present, a promoted employee receives no immediate increase if he is already receiving a rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates.

[7] The House bill passed in lieu of the Senate's version of the bill.

> In too many cases, accordingly, an employee who is promoted to greater responsibility or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities.
>
> Subsection (b) of section 802 corrects this situation. (emphasis supplied).

H. Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 2363, 2375. This section by section analysis contained in the House Report makes it clear that Congress intended to cure widespread administrative abuses in the promotion process by ensuring that *all* employees who were promoted to a GS position would receive an increase in salary. As the House Report stated, the section applies to "any officer or employee" who had been promoted or transferred to a GS position which pays more than his "existing rate of basic compensation". Congress could not have worded this section more broadly to achieve its purposes.

The Petitioner erroneously argues that Section 5334(b) was solely intended to address an inequity peculiar to the GS system; namely, the overlap of GS grades which denied a pay increase to employees who were promoted from an upper step of a lower GS grade to the first step of a higher GS grade. First, Wage System grades also overlap General Schedule grades.[8] Second, absent coverage under Section 5334(b), it is obvious that a WS employee who is moved to a GS job (like each of the Respondents here) could receive a reduction in salary even though his agency-employer had assigned him in-

---

[8] For example, Respondent LiBretto was employed at WS Grade 8, Step 4, in which he earned $16,473.60 per year. This grade fell between step 4 ($16,138) and step 5 ($16,627) of Grade 11 of the General Schedule. (Pet. App. 2a, J.A. 35).

creased duties and responsibilities. The problem addressed in Section 5334(b) impacts both blue-collar (WS) and white-collar (GS) workers alike and there is no legislative history which shows that Congress' solution to the problem was for the exclusive benefit of the GS employees.

The Petitioner boldly states that it might have, at its discretion, forced the Respondents to take a cut in pay when they were awarded their merit promotions. (Brief, p. 14). This is precisely the evil which Congress sought to eliminate when it enacted Section 802 of the Classification Act of 1949. Congress, over thirty years ago, made a policy decision that federal employees would not be asked to shoulder increased duties and responsibilities without a commensurate increase in salary. The Department of the Navy has no authority to contravene this policy determination by depriving federal employees of their statutory entitlements as part of a government-wide effort to reduce expenditures.[9]

In contrast to the broad purpose described in the House Report analyzing Section 802 of the Classification Act of 1949, *supra*, the Petitioner has cited no legislative history which would demonstrate that Congress

---

[9] The Petitioner contends that there is "no reason for Congress to require an automatic pay increase for every WS employee who is promoted into the General Schedule." (Brief, p. 20). Unlike GS employees, Petitioner believes WS employees do not need a monetary incentive to take on increased duties and responsibilities of a promotion into a higher GS position, because WS employees would be satisfied with "the enhanced prestige of a white collar job" and "better working conditions". (Brief, p. 21). These general assumptions, especially the absurd notion that blue-collar workers do not need or desire the same monetary benefits afforded white-collar workers, are wholly unsupported in the legislative history or in the record of this case. It is respectfully submitted that Petitioner's resort to this sophistry underscores the overall weakness in its position.

intended to limit the two step entitlement to promotions within the General Schedule. While the House and Senate Reports [10] and the remarks of some members of Congress [11] indicate that Section 5334(b) applies to employees who are promoted from GS positions, they do not state that those are the only employees who are to be protected under Section 5334(b). The two step increase obviously applies to employees who are promoted within the General Schedule, and it is not surprising that Congressmen Lesinski and Dulski referred to promotions within the General Schedule when describing how the provision would work, since most federal employees are covered by the General Schedule and there will be far more promotions within that system. Significantly, none of these comments can be interpolated as advocating the unlikely viewpoint that GS employees will be safeguarded from unfair treatment in promotions while the WS workers promoted into the same jobs will still be subjected to such mistreatment.[12]

Finally, the Petitioner contends that in 1972, when Congress codified and standardized the Wage System, it tacitly endorsed the way the Petitioner applies the "highest previous rate" rule to those who were promoted into GS positions from WS positions because it approved the application of the rule to transfers and reassignments

---

[10] Petitioner's Brief, p. 28.

[11] Petitioner's Brief, p. 29.

[12] The testimony of O. Glenn Stahl of the Civil Service Commission, relied on by Petitioner (Brief, p. 29, 30-31), is of little value in interpreting the statute. *March v. United States*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974). In any event, Mr. Stahl did not state, as the Petitioner implies he did, that Section 5334(b) is limited to promotions or transfers within the General Schedule. Mr. Stahl simply did not address the issue of whether the employees in their newly appointed GS positions must necessarily come from another GS position to be eligible for the two step increase. H.R. Rep. No. 1981, 86th Cong., 2d Sess. 2 (1960).

within the Wage System. (Brief, p. 31). The legislation under consideration at that time only involved the pay structure for WS positions; Congress was not considering the pay structure for GS positions. It is improper to convert this congressional action into an approval of governmental action which was not under consideration at the time. "[A]bsent some clear indication that Congress 'focused on the issues . . . directly related to the one presently before the Court,' . . . there is no basis for reading into its actions an intent to modify the plain meaning of the words" found in Section 5334(b). *Diamond v. Chakrabarty*, 447 U.S. 303, 314 (1980). (Citation omitted).

In summary, in enacting Section 5334(b) and its predecessor provision, Congress sought to prevent a previous inequity by ensuring that federal employees who accept promotions, with the attendant increase in duties and responsibilities, will be given at least a specified minimum salary increase. It is entirely consistent with the statutory scheme and congressional intent to reward employees who are promoted or transferred from lower Wage Schedule grades, as well as from lower General Schedule grades. The Petitioner has conceded that an employee who is promoted from one WS position to another is guaranteed a comparable benefit, as are the employees who cross over from GS positions to WS positions. (Pet. App. 7a-8a). Yet the Petitioner would have this Court believe—what the Court of Claims summarily rejected—that Congress intended to exclude from a guaranteed salary increase *only* employees promoted from WS positions to GS positions. Such an untoward result finds no support in either the language of Section 5334(b) or the public policies which prompted its enactment.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

MULHOLLAND & HICKEY
EDWARD J. HICKEY, JR.
General Counsel, Public
Employee Department, AFL-CIO,
Counsel of Record

THOMAS A. WOODLEY
RICHARD J. HIRN
1125 - 15th Street, N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 833-8855